IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 385

STATE OF CALIFORNIA,

Petitioner,

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, WILLIAM J. LANGSTON, AND H. C. GREER.

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March 7, 1957.

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CONSTITUTIONAL PROVISIONS AND STATUTES.

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OPINIONS BELOW.

The memorandum opinion of the District Court is reported in 132 F. Supp. 356.

CONSTITUTIONAL PROVISIONS.

These respondents add to "Statutes Involved", found at pages 2-3 of the Petitioner's Brief, the following: Section 8, Clause 3, Regulation of Commerce, of Article 1 of the Constitution of the United States, as follows:

> The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; (USCA Constitution Art. 1 § 1 to Art. 1 § 9, pp. 169, 200).

The second paragraph of Article 6 of the Constitution which reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

QUESTIONS PRESENTED.

The statement by the Petitioner at page 2 of its Brief of "Questions Presented" includes only two questions.

The first of these appears to be the question listed as 1 at pages 2 and 3 of the Petition for a Writ of Certiorari.

The second question presented at page 2 of the Petitioner's Brief appears to be that listed as 4, at page 3 of the Petition for a Writ of Certiorari.

These respondents are aware that the phrasing of the questions presented in the Petitioner's Brief need not be identical with that set forth in the Petition for Certiorari, and that the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

Nevertheless, to be certain that the questions presented for review are expressed in the terms and circumstances of the case, these respondents add to the list of Questions Presented the following two questions as listed at page 3 of the Petition for a Writ of Certiorari:

> "2. If the Act applies to a State operated railroad, whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State's employer-employee relationship?
>
> 3. Whether the contract enforcement procedures invoked herein against a State, are prohibited by the

Eleventh Amendment to the United States Constitution?''

STATEMENT OF THE CASE.

The Petitioner makes two references to the brief of these respondents in the United States Court of Appeals for the Seventh Circuit (Petitioner's Brief, pp. 9 and 13) and one reference to the brief of the "carrier members" before that Court (Petitioner's Brief, p. 13). Neither of these briefs is in the record before this Court.

In speaking of the suit brought by these respondents in the District Court for an order to require the First Division of the National Railroad Adjustment Board to consider and decide their claims, the Petitioner states that these respondents sought "an injunction against the carrier members and Executive Secretary of the First Division * * *" (Petitioner's Brief, p. 9). Actually, these respondents sought an injunction against *all* the members of the First Division, that is, the five carrier members and the five labor members, as well as against the Executive Secretary (R. 5-6, 10).

The Petitioner declares at page 12 of its Brief that the District Court upheld the contention of the carrier members that the Adjustment Board lacked jurisdiction to decide certain basic disputes raised by the pleadings. These respondents do not agree with the Petitioner's statement, but the respondents do not consider that this issue has any bearing on the questions posed for decision by this Court by the Petitioner's Petition for a Writ of Certiorari.

It might be wondered on reading the Petitioner's Statement of the facts what had become of the issues of *res judicata* (Petitioner's Brief, pp. 11, 12, and 15), of necessity for approval of the contract by the California Department of Finance (Petitioner's Brief, pp. 9 and 12), and of the contention that the California State Personnel

Board, rather than the Adjustment Board, has jurisdiction of the claims of these respondents (Petitioner's Brief, pp. 11-12).

Each of these three points has been eliminated from the case in this Court (page 9 of the Petition for a Writ of Certiorari).

SUMMARY OF ARGUMENT.

I.

A railroad that is a common carrier engaged in interstate commerce is subject to the Railway Labor Act even though owned by a state.

California contends that the Congress did not intend the Railway Labor Act to apply to state-owned railroads, and refers to the alleged general rule that a statute will not be applied to a sovereign in the absence of express words to that effect.

These respondents point out that had Congress intended to exclude state-owned railroads the Act would have said so.

This Court has held that California, as the owner of the State Belt Railroad in question, must comply with the Federal Safety Appliance Act. A California court has held the State to be subject to the Federal Employers' Liability Acts, and a Federal decision has held the State subject to the Federal Carriers Taxing Act in its operation of the State Belt Railroad.

The definition of the word "carrier" adopted by the Congress in writing the Railway Labor Act is broad, and contains no hint that a state-owner of an interstate railroad is to be exempt.

A decision of the United States Court of Appeals for the Fifth Circuit has held that the Railway Labor Act applies to an interstate railroad owned by a city.

The Congressional plan for the regulation of the general steam-railroad interstate system of transportation by means of the Railway Labor Act leads to the conclusion that an interstate carrier is subject to the Act even though owned by a state.

II.

The requirement of the Railway Labor Act that rates of pay, rules and working conditions of railway employees be established by collective bargaining excludes their dictation by California legislative and administrative action.

California wishes a free hand in dictating the terms and conditions of employment of the persons who operate the State Belt Railroad. California proposes to control their employment through its civil service laws and administrative regulations. These often conflict with the terms of the collective bargaining agreement of September 1, 1942 negotiated with the Board of State Harbor Commissioners for the railroad with the two labor organizations which represented operating employees pursuant to the Railway Labor Act.

The meaning of "collective bargaining" is not spelled out in the Railway Labor Act. However, decisions of this Court make it clear that the system proposed by California is the very antithesis of establishing rules and working conditions by employers and employees facing each other across the bargaining table, as contemplated by the Railway Labor Act. The Act excludes the dictation of terms and conditions of employment by California laws and regulations.

III.

The sovereign power reserved to the states is subordinate to the power vested in the Federal Government to regulate the subjects enumerated in Article 1, Section 8, of the Constitution.

California argues that a fundamental attribute of state sovereignty is the state's right to establish the terms upon which its employees will carry out state functions, and that the application of the Railway Labor Act to it, as a State, raises serious questions of constitutional power.

California overlooks the fact that the Constitution of the United States grants to the Congress the power to regulate commerce among the states, and that the Constitution and the laws of the United States made in pursuance thereof are supreme.

Numerous decisions of this Court which have considered this problem note that when a state chooses to engage in what is normally private enterprise, as contrasted with its traditional governmental functions, it is subject to regulation by the Federal Government.

This Court has held that the State Belt Railroad involved in this litigation is subject to the Federal Safety Appliance Act adopted by the Congress under interstate commerce powers.

The imposition of collective bargaining on the State of California in its operation of the State Belt Railroad is an incident of the Federal Government's supreme authority under the commerce clause of the Constitution.

IV.

The Eleventh Amendment is not a bar to the application of the Railway Labor Act to a common carrier engaged in interstate commerce when owned by a state.

California argues that inasmuch as enforcement provisions of the Railway Labor Act require use of federal judicial power at the instance of private parties, the Congress could not have intended that the Act apply to carriers owned by a state, because the Eleventh Amendment would prevent an enforcement suit.

The Eleventh Amendment would not prevent whatever enforcement suits might be required.

In its practical operation this Amendment has been the subject of frequent interpretation by this Court and many of these decisions have held that the Eleventh Amendment does not forbid a suit against a state officer or agency.

Article 6 of the Constitution established the supremacy of the Constitution and the laws of the United States made pursuant thereto. Article 1, Section 8, grants the Congress power to regulate interstate commerce.

Although adoption of the Eleventh Amendment apparently was prompted by a high regard for the sovereignty and dignity of the states, the current trend is against "legal irresponsibility" on the part of the states and of the Federal Government. The State of California has been a part of this trend.

The basic question is whether the protection afforded the States by the Eleventh Amendment is subordinate to the authority vested in the Federal Government by Article 1, Section 8. Although the precise problem posed is original and is believed to be without precedent in the decisions of this Court, these respondents urge that, in view of the consequences which would follow the subordination of the authority of the Federal Government to the interdiction of the Eleventh Amendment, the power of the Federal Government must be held supreme.

V.

A brief *amicus curiae* has been filed by the California State Employees' Association. In general, the Association argues that the rights and benefits which the employees of the State Belt Railroad enjoy under the collective bargaining agreement negotiated by the Brotherhoods as their representatives are less favorable than would be their rights and benefits if the rates, rules, and working conditions were fully subject to the California state law and administrative regulations.

The answer to this contention is that the Brotherhoods were freely chosen by the operating employees of the State Belt Railroad to be their craft representatives, and it is reasonable to suppose that if a majority of the operating employees preferred that their employment relationships be governed by the California law and administrative regulations, they could readily substitute the Association for the Brotherhoods as their collective bargaining representatives.

ARGUMENT.

I.

A Railroad That Is a Common Carrier Engaged in Interstate Commerce Is Subject to the Railway Labor Act Notwithstanding It May Be Owned by a State.

The reasoning upon which the Petitioner predicated its conclusion that a state-owned railroad is not subject to the Railway Labor Act is stated succinctly in the following quotation from the decision of the Supreme Court of California:

> "The Railway Labor Act does not *expressly apply* to state-owned railroads, 45 U.S.C.A. § 151, and it is well settled that statutes which in general terms divest pre-existing rights or privileges will not be applied to a sovereign, in the absence of express words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected." (Italics ours.) *State* v. *Brotherhood of Railroad Trainmen*, 232 P. 2d 857, 860.

The California decision, as the above quotation discloses, is based upon an assumption that is occasionally employed in statutory construction. The numerous considerations that justify a decision contrary to that reached by the California court have been marshalled and discussed in other court opinions. We refer particularly to the summary of arguments contained in the opinion by the California District Court of Appeals rendered in the litigation between the State of California and the Brotherhoods, reported at 222 P. 2d 27, and the dissenting opinion filed by Associate Justice Carter of the California Supreme Court in the same case on appeal, reported at 232 P. 2d 857, 864 (pp. 35-45 of Appendices, Petition for a Writ of Cer-

tiorari). In rejecting the argument of the State of California that the Railway Labor Act does not apply to the State Belt because the Act did not expressly apply to state-owned railroads, Justice Carter declared:

> "That Congress has 'consistently' excluded the state from labor laws—the third ground—is equally untenable. If that is true, then it supports my position, for Congress thought it must use language excluding the state when it desired to do so, and it did. But it did not employ such language in the Railway Labor Act and in the field of employer-employee relations in the railroad industry, and the courts have consistently held that the federal legislation includes the state.
>
> "In speaking of the history of the act—the fourth ground—the majority approach is wholly negative. It is said that it gives no indication that the state as a carrier was to be included. But it gives no indication to the contrary. True, the act probably arose out of cooperation between the unions and private carriers, but no doubt the other federal railroad laws were similarly initiated" (p. 43, Appendices, Petition for a Writ of Certiorari).

This Court has held that the fact that the State of California is the owner and operator of the State Belt Railroad does not put the operation of the railroad beyond the requirement of complying with the Federal Safety Appliance Act. *United States* v. *State of California*, 297 U. S. 175. The controlling effect of this decision was emphasized by Associate Justice Carter in his dissenting opinion (232 P. 2d 864) as follows:

> "In *United States* v. *State of California*, 297 U. S. 175 [56 S. Ct. 421, 80 L. Ed. 567], the *same* Belt Railroad was involved and the court was concerned with the federal Safety Appliance Act. 45 U. S. C. A. Sec. 1, *et seq.* That act has to do with standards of safety in train equipment. The particular problem presented was whether California was subject to the *penal* pro-

vision of the act for failing to comply with the safety standard. The court held that it was, and in so holding, stated principles which make it a binding precedent in the instant case. It found that the Belt Line is engaged in interstate commerce. A unanimous court said:

> 'The state urges that it is not subject to the federal Safety Appliance Act * * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case *it is argued that the statute is not to be construed as applying to the state acting in that capacity.*
>
> '* * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution* * * *.
>
> 'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, * * * and to *safeguard interstate commerce itself from obstruction* and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate * * * '"

In *Maurice* v. *State of California*, 43 Cal. App. 2d 270, 110 P. 2d 706, the State Belt Railroad was held to be subject to the Federal Employers' Liability Acts (45 U. S. C. sec. 51, *et seq.*); and in *State of California* v. *Anglim*, 129 F. 2d 455, it was held to be subject to the Federal Carriers' Taxing Act (then 45 U. S. C. sec. 261, *et seq.*).

Of foremost importance in considering this question is the definition of the word "carrier" which the Congress adopted when writing the Railway Labor Act. The definition of "carrier" is found in Section 1, First, of the Act (45 U. S. C. sec. 151 First). Its essential part reads as follows:

> "Section 1. When used in this Act and for the purposes of this Act—
>
> "First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * *."

The definition also declares:

> "* * * *Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transporation * * *."

There are two aspects of this definition that are of special interest when pondering the question of whether state-owned railroads are subject to the act. First, the word "carrier" is not defined by the customary method of describing the character of organizations that the Congress had in mind. Instead, the Congress adopted the definition of "carrier" as contained in another act, to wit, the Interstate Commerce Act. This was accomplished merely by saying:

> "The term 'carrier' includes any * * * carrier by railroad, subject to the Interstate Commerce Act."

This method of defining "carrier" ought logically to have the effect of making the geographical and jurisdictional scope of the Railway Labor Act identical with that of the Interstate Commerce Act. It would seem that, if a railroad is subject to the Interstate Commerce Act, the conclusion automatically follows that this railroad is also subject to the Railway Labor Act. Of this, more will be said later.

The second significant fact about the definition of "carrier" contained in the Railway Labor Act is that while "street, interurban, or suburban electric railway;" when functioning in their normal manner, are not included in the definition of "carrier," yet such carriers are made subject to the Act when they are functioning as a "part of the general steam-railroad system of transportation." (45 U. S. C. sec. 151, First.) This feature of the definition clearly indicates a Congressional conviction that the regulatory scheme embodied in the Railway Labor Act for avoiding "interruption to commerce or to the operation of any carrier,"* shall be applicable to all parts of that vast network of rail communication upon which the flow of interstate commerce of our country is dependent. This indication of a determination on the part of Congress to bring the whole of "the general steam-railroad system of transportation" under the labor-management policy embodied in the Railway Labor Act tends strongly to negative the idea urged by the Petitioner, that important segments of the country's general transportation system are not encompassed by the requirements of this labor-management policy solely because the ownership of these segments happens to be vested in a state or its municipalities.

We now turn to the definition of "carrier" as contained

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*45 U. S. C., sec. 152, First.

in the Interstate Commerce Act. The carriers that are made subject to the Interstate Commerce Act are described, in the main, by the following quotation from that Act:

> "(1) The provisions in this chapter shall apply to common carriers engaged in * * * the transportation of passengers or property wholly by railroad * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia * * *."*

Under this definition a railroad which lies wholly within one state will be subject to the Interstate Commerce Act if it *participates* in the movement of persons and property from one state to another. *United States* v. *Union Stock Yard*, 226 U. S. 286; *United States* v. *Illinois Terminal R. Co.*, 168 F. 546.

Whether the property used by the common carrier is owned by a corporation, a natural person, an association, a trust, or even by a political entity, appears to have no bearing upon the test thus laid down by the Act for determining whether a railroad shall be subject to the Act. The test, as we have seen, is a functional test. The courts have so held. For example, the City of New Orleans owns a railroad named the New Orleans Public Belt Railroad. This railroad is engaged in interstate commerce, and the question has arisen whether the fact that it is municipally owned would excuse it from complying with the Interstate Commerce Act. The courts have held that it is subject to the Act. See *City of New Orleans* v. *Texas & N. O. R. Co.*, 195 F. 2d 882, 884; and also *City of New Orleans* v. *Texas & Pac. Ry. Co.*, 195 F. 2d 887, 889.

The majority opinion issued by the California Supreme Court in the litigation between the State and the Brotherhoods stands alone in its holding that Congress intended

* 49 U. S. C., sec. 1.

to exclude state-owned railroads from the requirements of the Railway Labor Act. This same question subsequently arose in a federal court case involving an enforcement proceeding based upon an award and order issued by the Adjustment Board requiring the New Orleans Public Belt Railroad Commission to reinstate a discharged employee. The enforcement of the award and order was resisted before the Court of Appeals for the Fifth Circuit primarily on the authority of the decision rendered by the California Supreme Court.

The Court of Appeals rejected the California Supreme Court decision as unsound, commenting as follows:

> "We do not think that the decision of the California Supreme Court on the coverage of the Railway Labor Act, 45 U. S. C. A. § 151 *et seq.*, is consistent with one of the main designs of that act 'to avoid any interruption to commerce or to the operation of any carrier engaged therein' by requiring resort to the procedures it provides in the event of disputes 'before they reach acute stages that might be provocative of strikes,' *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 242, 70 S. Ct. 577, 579, 94 L. Ed. 795. Nor does that decision accord full recognition to the broad definition of the term 'carrier' in the Railway Labor Act. That decision is also contrary to the views of District Judge Kennerly in *National Council of Railway Patrolmen's Union* v. *Sealey*, 56 F. Supp. 720, 722-723, affirmed by this Court in 5 Cir., 152 F. 2d 500, see page 502, and is incompatible with decisions of the United States Supreme Court and of other Federal Courts. We hold, therefore, that the Railway Labor Act applies to Public Belt." (*New Orleans Public Belt R. Com'n.* v. *Ward*, 195 F. 2d 829, 831.)

We believe that the Congress did not intend to excuse from compliance with the Railway Labor Act those many railroads of this country that happen to be owned, or owned and operated, by states or their political subdivi-

sions but which are an integral and vital part of the general steam-railroad interstate system of transportation.

One of the best statements of the significance of the Railway Labor Act to the operation of the general steam-railroad interstate system of transportation is given in the dissent by Mr. Justice Frankfurter in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 751-752. To quote from Mr. Justice Frankfurter:

> "From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.
>
> The Railway Labor Act of 1934 is primarily an instrument of government. As such, the view that is held of the particular world for which the Act was designed will largely guide the direction of judicial interpretation of the Act. The railroad world for which the Railway Labor Act was designed has thus been summarized by one of the most discerning students of railroad labor relations: 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. * * * This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been

firmly established.' Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937), 46 Yale L. J. 567-569.

The Railway Labor Act of 1934 is an expression of that 'reign of law' and provides the means for maintaining it. Nearly half a century of experimental legislation lies behind the Act. It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies."

Mr. Justice Frankfurter does not mention the ownership of railroads by states. But his description of the Railway Labor Act of 1934 as "an instrument of government" justifies the conclusion that the State Belt, which happens to be owned by California, can no more be excised from the general interstate system of railroad transportation than can the Southern Pacific Railway, which also happens to operate in the State of California.

II.

The Requirement of the Railway Labor Act That Rates of Pay, Rules and Working Conditions of Railway Employees Be Established by Collective Bargaining Excludes Their Dictation by California Legislative and Administrative Action.

The earlier litigation in the California courts developed because the State of California wishes a free hand in dictating the terms and conditions of employment of the persons who operate the State Belt Railroad. The existing law of California illustrates the character of control that the State intends to exercise over the rates of pay, rules and working conditions of the State Belt Railroad

employees. These California civil service laws conflict in numerous respects with the terms of the September 1, 1942 collective bargaining agreement (p. 84, Appendices, Petition for Certiorari). For example, contrary to the universal rule in effect on the railroads of the country, where seniority is of the utmost importance to the right to fill vacancies and to the right of promotion, the California law gives seniority only incidental effect. Thus Article 24, Section 1 of the California Constitution provides:

> "§ 1. *Permanent appointments; promotions.*
> Section 1. Permanent appointments and promotion in the state civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination" (p. 74, Appendices, Petition for Certiorari).

California Government Code, Section 18951 provides:

> "§ 18951. *Advancement according to merit and ability.*
> The board and each State agency and employee shall encourage economy and efficiency in and devotion to State service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently services assigned them, and every person in State service shall be permitted to advance according to merit and ability."

Article 13 of the agreement of September 1, 1942 provides, on the contrary, that promotion will be governed by *seniority* and ability (R. 107).

The California civil service laws vest in the State Personnel Board a large measure of control over wages and working conditions of the State Belt Railroad employees. California Government Code, Section 18850 provides:

> *"Establishment and adjustment of salary ranges: Basis: Factors to be considered: Adjustments not to require expenditures in excess of appropriations:*

Retroactive changes. The board shall establish and adjust salary ranges for each class of position in the State civil service. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The board shall make no adjustments which require expenditures in excess of existing appropriations which may be used for salary increase purposes. The board may make a change in salary range retroactive to the date of application for such change" (p. 78, Appendices, Petition for Certiorari).

In contrast with this law, Article 1 of the agreement of September 1, 1942 sets up specific hourly rates of pay without reference to the State Personnel Board (R. 100).

California Government Code, Section 19533, provides for layoffs in accordance with efficiency and seniority, while Article 14 of the agreement of September 1, 1942 requires layoffs in reverse order of seniority (R. 108-109).

It is evident from this and other legislation that the State of California proposes, either through statutes or by regulations issued by the Personnel Board, to dictate in an *ex parte* manner such aspects of the employment relationship as may appeal to it, and such dictation knows no limit in the detail to which it may extend. The attitude of the State is that when the legislature has enacted a law that prescribes some phase of the employer-employee relationship, there remains no leeway for the collective bargaining process on this subject. As the State of California said in the present litigation in its Complaint in Intervention (R. 27):

> "• • • the rights of employment and to compensation and conditions of work are all matters which are established by the laws of the State of California, particularly the civil service laws of Intervenor and

> that no rights with respect to any of the matters referred to in the complaint were acquired by plaintiffs under the said collective bargaining agreement. * * *"

A further significant limitation which the State of California would impose on the collective bargaining process is its statutory scheme of vesting in the State Department of Finance supervisory authority over the contracts made by the Board of State Harbor Commissioners (p. 34, Appendices, Petition for Certiorari).

The responsibility for operating the State Belt Railroad is vested by law in a Board of State Harbor Commissioners consisting of three members. According to Section 3150 of the Harbor and Navigation Code, the Board of State Harbor Commissioners is authorized to "locate, construct, maintain, operate and extend" the State Belt Railroad. Under this grant of authority the Harbor Board may bargain collectively with representatives of the State Belt Railroad employees. But the Harbor Board has no authority to bargain *to a conclusion* on any subject.

California Government Code, Section 13070, gives to the Department of Finance a general supervisory authority to approve or to veto rates of pay or any other subject agreed upon in collective bargaining between the Board of State Harbor Commissioners and the representatives of State Belt Railroad employees (p. 35, Appendices, Petition for Certiorari). Code Section 13370 prescribes the manner in which copies of contracts and all supporting data shall be transmitted to the Department of Finance for detached consideration and ultimate approval or veto.

The importance ascribed by the Supreme Court of California to the action by the Department of Finance is declared in *State* v. *Brotherhood of Railroad Trainmen*, 232 P. 2d 857, at pages 863-864 as follows:

> "* * * Moreover, even if we were to accept the argument that the requirement of approval of salaries

by the Department of Finance is tantamount to transferring to the department the power to 'fix' compensation of Harbor Board employees, the legislative intent to create *supervisory* powers in the department is so clear and unmistakable that section 18004 must be regarded as modifying all earlier legislation authorizing specific state agencies to fix the salaries of their employees." (Italics ours.)

Is the exercise of this supervisory or veto power over the collective agreements negotiated by the Harbor Board with the employees' representatives consistent with the federal duty imposed upon railway management by the Railway Labor Act to establish rates of pay, rules and working conditions by the process of collective bargaining? Is there an inconsistency between the obligation to establish rates of pay, rules and working conditions by the process of collective bargaining and the proposal by the State of California that it be permitted to establish the terms and conditions of employment by legislative action?

The answer to these questions depends upon what constitutes *collective bargaining* within the meaning of the federal law.

The obligation imposed upon carriers and the representatives of their employees to bargain collectively for the purpose of establishing rates of pay, rules, and working conditions, and the importance attached by the Congress to the maintenance of such agreements and their enforcement, is set forth in the following provisions of the Railway Labor Act (45 U. S. C. sec. 152, First, and Seventh, and sec. 156):

Sec. 2, First. "It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, * * *

Sec. 2, Seventh. "No carrier, its officers, or agents shall change the rates of pay, rules, or working condi-

tions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Sec. 6. "Carriers and representatives of the employees shall give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conferences between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * *"

This Court commented upon the essentials of collective bargaining as embraced by the Railway Labor Act in the course of its decision in the case of *Order of R. Telegraphers* v. *Railway Exp. Agency;* 321 U. S. 342, in which case it overruled a contention advanced by the carrier to the effect that the duty to bargain collectively for the purpose of establishing rates of pay, rules, and working conditions did not prevent the carrier from making individual agreements with its employees on the same subjects. Of this duty to bargain collectively for the purpose stated, this Court had the following to say (321 U. S. 346-347):

"Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures. It is insisted that exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. * * *"

This Court observed in *National Labor Relations Board* v. *Jones & Laughlin S. Corp.*, 301 U. S. 1, at 44, that the duty to bargain collectively imposed upon employers by the National Labor Relations Act has its analogue in the Railway Labor Act.

The original National Labor Relations Act declared the policy of the United States regarding the duty of employers to bargain with the representatives of its employees, in the following language:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions of their employment* or other mutual aid or protection." (29 U. S. C. sec. 151) (Italics ours).

Section 8 of the original Act was amended by the Labor Management Relations Act of 1947, by the inclusion of a definition of what constitutes collective bargaining, as follows:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *" (29 U. S. C. sec. 158(d)).

The theory behind the Federal policy of compelling em-

ployers and employees to hammer out the terms and conditions governing their employer-employee relationship by the process of collective bargaining was succinctly stated by this Court in *National L. R. Bd.* v. *Jones & Laughlin S. Corp.*, 301 U. S. 1, 45, in the following manner:

> "* * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. * * *"

An oft-quoted statement by the Court of Appeals for the Fifth Circuit, made in *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, describes the federally imposed collective bargaining process and its anticipated accomplishment in the following manner (103 F. 2d 94):

> "* * * the Act does not compel agreements between employers and employees, but commands free opportunity for negotiation as likely to bring about adjustments and agreements which will promote industrial peace. The only compulsion to agreement is the possibility of strike by dissatisfied employees on the one side, or inability to continue business and afford any employment at all on the other. *We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances.* * *" (Italics ours.)

Perhaps the latest authoritative declaration on this subject was made by this Court in the case of *N. L. R. B.* v. *American Nat. Ins. Co.*, 343 U. S. 395, at 401-405, as follows:

> "* * * The National Labor Relations Act is de-

signed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

"*Enforcement of the obligation to bargain collectively is crucial to the statutory scheme.* And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences. Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively required the employer 'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement.' The duty to bargain collectively implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by an explanation of the purpose and meaning of the phrase 'bargain collectively in a good faith effort to reach an agreement.' This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the National Labor Relations Board and the Courts of Appeal.

"In 1947, the fear was expressed in Congress that the Board 'had gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.' Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not

require submission of counter-proposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act * * *" (Italics ours.)

The essential element in "collective bargaining" required of employers and of employees' representatives by the Railway Labor Act and the National Labor Relations Act is what the term itself implies, to-wit, the give and take of traditional Yankee bargaining. Conduct and methods that have a tendency to defeat this bargaining process are inferentially forbidden by the law.

An employer, the Aluminum Ore Company, freely engaged in collective bargaining for the purpose of establishing wages and working conditions, but just before concluding the bargaining sessions the Company announced that it would continue its established practice of fixing wages and wage increases by *ex parte* decision. This action was condemned by the Court of Appeals for the Fourth Circuit in the case of *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485. The court's reasoning in condemning *ex parte* wage adjustments on the grounds that they are in conflict with the duty to establish wages by collective bargaining, was explained as follows (131 F. 2d 487):

"But, to our minds, this was not the collective bargaining required by the act. It was not the giving and taking in open discussion and negotiation contemplated by Congress. Rather it was reversion to the procedure of the past upon the part of the employer effectuating removal of bargaining concerning the exact subject matter at issue. By the employer's act, the union was thereafter excluded from bargaining in determining what the increases should be. Thereafter, it was to have no voice in such decision, for determination of all increases was reserved to the exclusive jurisdiction of petitioner subject only to a pro-

vision for the hearing of future individual grievances. Though the past relationship may have been satisfactory; though the system had been in force for some 40 years with resultant peaceful and friendly relationship between employer and employees, petitioner was confronted with requirements of the National Labor Relations Act, 29 U. S. C. A. § 151 *et seq.*, to desist from such method of procedure and to inaugurate, in lieu of it, round table bargaining upon the subject of wage increases. *This contemplates exchange of information, ideas and theories in open discussion and an honest attempt to arrive at an agreement.* The method adopted by petitioner ignored this standard of conduct and amounted in its essence to a statement that 'we shall determine the increases and they will stand as what we are willing to do subject only to the right of individuals to present grievances.' We think the evidence justifies the finding of the Board that the employment of unilateral procedure, under the circumstances presented, was not within the spirit or contemplation of the act." (Italics ours.)

One conclusion to be drawn from the foregoing authorities is perfectly obvious. That conclusion is that rates of pay, rules and working conditions are not to be established by *ex parte* decisions arrived at on the part of the employer in the face of collective bargaining proposals advanced by the employees. Time was, before the establishment of the Federal policy announced in the Railway Labor Act and the National Labor Relations Act, when rates of pay, rules and working conditions were simply decreed by the employer. The employee either accepted them, or he did not work. Discontent with the conditions of employment established in this manner led to widespread labor strife. It was to avoid these conditions and the resultant interference with the production of goods and the flow of commerce that Congress adopted the Federal policy of balancing the economic power of the employer with a roughly equal economic power on the part of the

employees, by assuring to the latter the right to organize and to be heard through representatives, and by requiring that wages, rules of employment and working conditions be established by collective bargaining between management and the representatives of the employees.

The process of collective bargaining presents an opportunity to the employee and to the employer for each to persuade the other of the worth of his views. To obtain an increase of wages, the employees' representative must convince the employer that for one, or perhaps several, reasons the employees should receive a higher wage. On the other hand, particularly if the employees are closely organized, the employer may himself bear the burden of convincing the employees' representative that the business has reached the limit of its ability to pay wage increases. Similarly, the establishment of more favorable rules of employment and improved working conditions depends upon the employees' representatives having the opportunity and the ability to convince management of the need to make such changes.

To be successful, collective bargaining—this process of the employer and the employee each attempting to sell the other his ideas on what should be the terms and conditions of employment—must have on each side of the bargaining table persons whose minds are open to conviction and, being convinced, are able to make decisions.

One can hardly imagine conditions less favorable to the success of this process than the conditions that the State of California now maintains that it has the right to impose upon the employer-employee relationship obtaining between the State and the employees who operate the State Belt Railroad.

We believe it to be perfectly obvious that if the operation of the State Belt Railroad is subject to the Railway

Labor Act, then the Federal policy of requiring employers to bargain collectively with the representatives of their employees as a means of establishing rates of pay, rules and working conditions excludes California's proposals. The laying down of rules and working conditions through the enactment of laws by the California State legislature comes close to being the very antithesis of establishing rules and working conditions by employers and employees facing each other across the bargaining table. The same must be said of the California method of having the members of the State Harbor Commission engage in collective bargaining with the representatives of the railroad employees and then subject the agreements resulting from this bargaining to the veto power of an independent and unrelated department of the state, such as the Department of Finance. *Lacking is that all-important requirement of collective bargaining, namely, that the mind that makes the decisions must participate in the give-and-take of argument and counter-argument, from which process are born the compromises that constitute the product of collective agreements.*

If the authority of the Federal Government to regulate interstate commerce is to be supreme under the Constitution, then the authority of a state to prescribe the terms and conditions under which its employees shall operate a railroad engaged in interstate commerce must yield to what is now the Federal policy of requiring that these terms and conditions of employment be established through the process of collective bargaining.

This Court has already held that state law may not interfere with the collective bargaining duties imposed by the National Labor Relations Act upon employers and employees. For example, in *Hill* v. *Florida*, 325 U. S. 538, the State enjoined a labor union from functioning until it had complied with certain statutory requirements. The

injunction was invalidated on the ground that the Wagner Act included a "federally established right to collective bargaining" with which the injunction conflicted. As the Court said at page 542:

> "* * * The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that § 4 of the Florida Act is repugnant to the National Labor Relations Act."

In *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, an unsigned collective bargaining agreement which was not to be performed by the employer within one year was held to be binding on the employer under the National Labor Relations Act, notwithstanding the provisions of the New York Statute of Frauds voiding all such agreements. As the Court said at page 910:

> "But petitioner also alleges the invalidity of the 1946 contract as to him on the ground that the New York Statute of Frauds, N. Y. Personal Property Law, McK. Consol. Laws, c. 41, § 31, voids all agreements not to be performed within one year which are not signed by the party to be charged. The contention can have no weight; *the vagaries of state rules of law may not override provisions of a federal act geared to the effectuation of an important national labor policy. Hill* v. *State of Florida, ex rel., Watson, Atty. Gen.*, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 123, 64 S. Ct. 851, 88 L. Ed. 1170. A state statute of frauds, no matter what its wording, cannot transform into an unfair labor practice activity under the Act otherwise validated by a binding oral contract between employer and union. * * *" (Italics ours.)

The agreement of September 1, 1942 is a valid agreement under Federal law. To the extent that its provisions established rates of pay, rules and working conditions inconsistent with the statutes of the State of California, the latter must yield.

III.

The Sovereign Power Reserved to the States Is Subordinate to the Power Vested in the Federal Government to Regulate the Subjects Enumerated in Article 1, Section 8, of the Constitution.

California argues that the application of the Railway Labor Act to it, as a State, raises serious questions of Constitutional power. It contends that a fundamental attribute of state sovereignty is the state's right to establish the terms upon which its employees will carry out state functions and that the incidental importance of collective bargaining by state employees of a railroad engaged in interstate commerce cannot justify federal interference (Petitioner's Brief, pp. 51-61).

California overlooks three points:

1. Section 8, Clause 3, of Article 1 of the Constitution of the United States grants to the Congress the power to regulate commerce among the several states.

2. Article 6 of the Constitution provides that the Constitution, and the laws of the United States which are made in pursuance thereof, shall be the supreme law of the land.

3. A state which chooses to engage in what are normally private enterprises, as contrasted with its traditional governmental functions, is subject to regulation by the Federal Government.

Numerous decisions of this Court have considered this problem. In *South Carolina* v. *United States*, 199 U. S. 437, the Constitutional provision involved was the power of Congress to impose license taxes for revenue purposes. To quote:

> "The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that

they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors." * * * (p. 447).

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." (p. 448).

* * * * *

"Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it." (p. 457).

* * * * *

"Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet when-

ever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor is not invalidated by the fact that they are the agents of the State which has itself engaged in that business * * *" (p. 463).

In *University of Illinois* v. *United States*, 289 U. S. 48, the Constitutional provision involved was that which gives to Congress the power to regulate commerce with foreign nations. To quote from the opinion:

"The University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted at the rates prescribed by the Tariff Act of [September 21,] 1922, chap. 356, 42 Stat. at L. 858, U. S. C. title 19, § 121. The University paid under protest, insisting that as an instrumentality of the State of Illinois, and discharging a governmental function, it was entitled to import the articles duty free." * * * (page 56).

"The Tariff Act of 1922 is entitled—'An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.' The Congress thus asserted that it was exercising its constitutional authority 'to regulate commerce with foreign nations.' The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 193, 6 L. ed. 23, 69. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action" * * * (pages 56-57).

* * * * *

"Protecting the functions of government in its proper province, the implication ceases when the

boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted. To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles" (pages 58-59).

* * * * *

In *Ohio* v. *Helvering*, 292 U. S. 360, the question again was the collection of federal taxes imposed upon liquor dealers in a State which had assumed a monopoly of the business of distributing and selling spirituous liquors. At page 369 of its opinion this Court said:

"If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." * * *

Several cases have arisen regarding the immunity from federal income tax of employees of transportation facilities owned by state governments. In *Helvering* v. *Powers*, 293 U. S. 214, the question presented was whether the compensation paid to members of the Board of Trustees of the Boston Elevated Railway Company was constitutionally exempt from the federal income tax. Immunity was sought on the ground that the trustees were officers of the Commonwealth of Massachusetts and instrumentalities of its government (page 220). At page 225 this Court said:

> "The principle of immunity thus has inherent limitations." * * *
>
> "And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity." * * *

Again, in *Helvering* v. *Gerhardt*, 304 U. S. 405, this Court held that employees of the Board of New York Authority, a corporation created as an agency of the States of New York and New Jersey to construct and operate transportation and terminal facilities, are not employees of a state or a political subdivision thereof within a Treasury regulation exempting from federal income tax the compensation of state officers or employees for services rendered in connection with the exercise of an essential government function of the state.

In *Allen* v. *Regents of University System of Ga.*, 304 U. S. 439, the respondent was an instrumentality of the State of Georgia having control and management of the

University of Georgia and the Georgia School of Technology. The respondent sought an injunction against the collection of the federal admissions tax in respect of athletic contests participated in by teams representing these colleges. In denying the injunction this Court said:

> "Third. We come then to the merits. For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the State government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the State authorities and their determination is not subject to review by any branch of the Federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the State activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a State agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States * * *" (pp. 449-450).
>
> "In final analysis the question we must decide is whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a state may withdraw the business from the field of Federal taxation." (p. 451.)
>
> * * * * *
>
> "Moreover the immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain. As was said in *South Carolina* v. *United States, supra* (199 U. S. at p. 457, 50 L. ed. 268, 26 S.

Ct. 110, 4 Ann. Cas. 737): 'Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it * * *'." (pp. 452-453.)

In *California* v. *United States*, 320 U. S. 577, the subject involved was the power of the Federal Government to issue regulations governing the operation of waterfront terminals owned by the State of California and the City of Oakland. To quote from the opinion of this Court:

"The United States Maritime Commission found that terminals along the commercial waterfront in the Port of San Francisco were engaged in preferential and unreasonable practices in that they allowed excessive free time and made non-compensatory charges for their services, all in violation of §§ 16 and 17 of the Shipping Act of 1916, as amended. Accordingly, the Commission ordered the cessation of these proscribed practices * * *." (p. 578.)

"Two of the terminal operators in the San Francisco Bay area were the State of California and the City of Oakland. They brought these proceedings to set aside the Commission's order in so far as it applied to them * * *." (p. 579.)

"* * * The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies. We need not rest on in-

ference to avoid a construction that would have such dislocating consequences. The manager of the bill which became the Shipping Act of 1916, speaking on the floor of the House, left no doubt that the legislation was designed to prevent discrimination no less by public than by private owners. 53 Cong. Rec. 8276. And whatever may be the limitation implied by the phrase 'in connection with a common carrier by water' which modifies the grant of jurisdiction over those furnishing 'wharfage, dock, warehouse, or other terminal facilities,' there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission. Finally, it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies. *United States* v. *California*, 297 U. S. 175, 184, 185, 80 L. ed. 567, 572, 573, 56 S. Ct. 521." (pp. 585-586.)

In *Case* v. *Bowles*, 327 U. S. 92, the State Commissioner of Public Lands of the State of Washington held a public auction for the sale of timber on school lands. One of the respondents bid an amount in excess of the ceiling price fixed by Maximum Price Regulation No. 460 of the Federal Price Administrator. The Federal Price Administrator commenced an action in the Federal District Court to enjoin the State Commissioner of Public Lands and the respondent from completing the timber transaction at a price above the ceiling fixed by the Regulation. The District Court held that the federal Emergency Price Control Act did not grant the Price Administrator authority to set maximum prices for school land sold by the State (pp. 95-96). In its opinion this Court held:

"We now turn to petitioner's Constitutional conten-

tion. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. The contention rests on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other * * *.'" (p. 101:)

"But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioner's argument is that the extent of that power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved. *Cf. United States* v. *California, supra* (297 U. S. at 183-185, 80 L. ed. 572, 573, 56 S. Ct. 421).

The State of Washington does have power to own and control the school-lands here involved and to sell the lands or the timber growing on them, subject to the limitations set out in the Enabling Act. And our only question is whether the State's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.

To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in *M'Culloch* v. *Maryland*, 4 Wheat (U. S.) 316, 420, 4 L. ed. 579, 605, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the National Government.'

Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that 'The Constitution and the Laws of the United States * * * made in pursuance thereof * * * shall be the supreme Law of the Land * * *'." (pp. 101, 102, 103.)

Finally, the very State Belt Railroad involved in the present litigation has been determined by this Court to be subject to regulation by the Congress under interstate commerce powers. As this Court declared in *United States* v. *California*, 297 U. S. 175:

"2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see *Sherman* v. *United States*, 282 U. S. 25, 75 L. ed. 143, 51 S. Ct. 41, *supra*; *Denning* v. *State*, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitu-

tionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

Despite reliance upon the point both by the Government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619, 624, 78 L. ed. 1025, 1029, 54 S. Ct. 542; *Green* v. *Frazier*, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; *Jones* v. *Portland*, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national Government when their regulation is appropriate to the regulation of interstate commerce. *United States* v. *Louisiana*, 290 U. S. 70, 74, 75, 78 L. ed. 181, 184, 185, 54 S. Ct. 28; *Railroad Commission* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086; Shreveport Rate Cases (*Houston, E. & W. T. R. Co.* v. *United States*) 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833. A contract between a state and rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, *New York* v. *United States*, 257 U. S. 591, 66 L. ed. 385, 42 S. Ct. 239, as are state agencies created to effect a public purpose, see *Sanitary Dist.* v. *United States*, 266 U. S. 405, 69 L. ed. 352, 45 S. Ct. 176; *University of Illinois* v. *United States*, 289 U. S. 48, 77 L. ed. 1025, 53 S. Ct. 509; see *Georgia* v. *Chattanooga*, 264 U. S. 472, 68 L. ed. 796, 44 S. Ct. 369. In each case the power of the state is

subordinate to the constitutional exercise of the granted federal power. (pp. 183-184.)

California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. * * *." (p. 185.)

The decisions of this Court establish that the Federal Government has the necessary authority to impose collective bargaining on the State of California, just as the Federal Government has done on all other owners of railroads engaged in interstate commerce. The imposition of such collective bargaining is an incident of the Federal Government's authority under Section 8, Clause 3, of Article 1 of the Constitution of the United States to regulate commerce among the several states.

IV.

The Eleventh Amendment Is Not a Bar to the Application of the Railway Labor Act to a Common Carrier Engaged in Interstate Commerce When Owned by a State.

California argues that inasmuch as enforcement provisions of the Federal Railway Labor Act require use of federal judicial power at the instance of private parties,* the Congress could not have intended that the Act apply to common carriers engaged in interstate commerce and owned by a state, because the Eleventh Amendment would prevent an enforcement suit against the state (Petitioner's Brief, pp. 41-51).

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* All of the positive requirements of the Railway Labor Act may, of course, be enforced by appropriate court proceedings, under general principles of law. However, in one instance, the Act itself spells out the detail of the legal action which may be brought: enforcement of an Award rendered by the National Railroad Adjustment Board (45 U. S. C. A. sec. 153 First (p)).

These respondents answer that the Eleventh Amendment would not prevent whatever enforcement suits might be required.

The Eleventh Amendment of the Constitution of the United States is as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In its practical operation this Amendment has been the subject of frequent interpretation by this Court. For example, it will be observed at once that the Amendment forbids suit against a state by citizens of another state. However, this Court has held that the effect of the Amendment is to prohibit suits in Federal Courts against one of the United States by its own citizens (*Hans* v. *Louisiana*, 134 U. S. 1; *Fitts* v. *McGhee*, 172 U. S. 516).

Again, Courts have interpreted the Amendment as not prohibiting a suit against a state, if that state gave its consent to such suit by its laws (*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 392), or by its actions (*Standard Oil Co.* v. *United States*, 25 F. (2d) 480, 484; *Clark* v. *Barnard*, 108 U. S. 436, 447).

Again, Courts have held that the Eleventh Amendment does not forbid a suit against a state officer or agency which has tortiously inflicted injury on a person, or who has wrongfully failed to comply with a positive requirement of law (*M'Callum* v. *United States*, 298 F. 373; *Hopkins* v. *Clemson College*, 221 U. S. 636; *People* v. *Superior Court*, 29 Cal. 2d 754, 178 P. 2d 1); nor does it prevent a suit to restrain unconstitutional action threatened against an individual by a state officer or agency (*Georgia R. & Bkg. Co.* v. *Redwine*, 342 U. S. 299).

Finally, this Court has held that the prohibition of the Eleventh Amendment does not extend to a suit against a corporation whose stock is owned by a state. *Bank of the United States* v. *Planters' Bank of Georgia,* 9 Wheaton 904. As this Court said at page 907:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

See also *Bank of Kentucky* v. *Wister,* 2 Peters 318.

California's argument that the Congress could not have intended to make state-owned railroads subject to the Railway Labor Act because of the prohibitions of the Eleventh Amendment disregards the second paragraph of Article 6 of the Constitution which establishes the supremacy of Federal law when regulating subjects over which the Congress is given authority by Article 1, Section 8. These provisions are as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof • • • shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (second par. of Art. 6).
>
> "The Congress shall have Power • • • to regulate Commerce • • • among the several States • • •" (Art. 1 Sec. 8).

The supremacy of the powers of the Federal government when their exercise conflicts with the interests of a state has been firmly established by decisions of this Court. Illustrations of such cases have been discussed

at length in part III of the Argument of this Brief and need not be repeated here.*

The Eleventh Amendment was passed in consequence of the decision of this Court in *Chisholm* v. *Georgia,* 2 Dall. 419, in which it was held that a state could be sued by a citizen of another state in assumpsit. The Amendment was declared by the President to have been ratified January 8, 1798.**

Although the Eleventh Amendment appears to have been prompted by a high regard for the sovereignty and dignity of the states, the trend of current philosophy is against "legal irresponsibility"*** on the part of the states and of the Federal Government. This trend was apparent in *Sloan Shipyards Corp.* v. *United States S. Bd. E. F. Corp.,* 258 U. S. 549, in which this Court held that the United States Shipping Board Emergency Fleet Corporation, which was incorporated pursuant to Congressional authorization under the general laws of the District of Columbia, was not so far put in place of the United States (which owned all of the capital stock) as to share the immunity of the United States from suit.

The trend was specifically acknowledged in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, when this Court, speaking through Mr. Justice Frankfurter, declared at pages 390-391:

> "Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for

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* See pages 31-42 of this Brief.

** A discussion of the historical background of the adoption of the Amendment is contained in *Monaco* v. *Mississippi,* 292 U. S. 313.

*** *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 388.

governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

The State of California has been in the vanguard of the current trend toward putting aside the cloak of sovereign immunity from suit. Since 1893 this State has, through successive legislative enactments, authorized suits against the State by persons having claims sounding either in contract or in tort. The history of California's retreat from the doctrine of "legal irresponsibility" is reviewed in the decision by the Supreme Court of California in the case of *People* v. *Superior Court*, 29 Cal. 2d 754, 178 P. 2d 1.

The basic question proposed by California's contention that the Eleventh Amendment bars the application of the Railway Labor Act to a common carrier engaged in interstate commerce, when it is owned by a state, is this:

If Congress, when regulating a subject over which it has been given supreme authority by Article 1, Section 8 of the Constitution, deems it necessary or desirable as an incident of such regulation to authorize suits by employees against states operating interstate railroads, is such exercise of Federal power subordinate to the protection against suit afforded the states by the Eleventh Amendment; or is the protection afforded the states by the Eleventh Amendment subordinate to the authority vested in the Federal Government by Article 1, Section 8?

The cases already cited and discussed by these respond-

ents in part III of their Argument in this Brief establish that the regulatory power of the Federal Government arising from the Constitutional grant of authority contained in Article 1, Section 8, takes precedence over the sovereign powers of the states.

However, the precise problem posed here is without precedent in the decisions of this Court, so far as we have been able to discover.

The Circuit Court of Appeals for the Fifth Circuit answered this question in *Illinois Cent. R. Co.* v. *Mississippi Railroad Commission*, 138 F. 327. In this case the Mississippi Railroad Commission, an agency of the State of Mississippi, issued orders concerning the operation of the trains of the Illinois Central Railroad Company. The railroad filed suit against the Commission to enjoin the enforcement of certain of those orders. The Court said at page 331:

> "We are met at the threshold of the case with the proposition that this suit is forbidden by the eleventh amendment; that it is, in effect, a suit against a state by a citizen of another state. The Constitution, with its amendments, is construed as one instrument, and the eleventh amendment cannot be applied to nullify the power conferred on Congress to regulate commerce among the several states. It is not a barrier to judicial investigation to ascertain whether other provisions of the Constitution have been disregarded by state action. *Prout* v. *Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Fargo* v. *Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761."

On appeal, this Court affirmed the judgment (*Miss. R. R. Com.* v. *Illinois Cent. R. R.*, 203 U. S. 335), but apparently on the ground that the suit was not against the State of Mississippi. As this Court said at page 340:

"The first objection raised by the appellant is.

that this suit is, in substance, one against a State. The commission was created by the State of Mississippi, under the authority of its constitution and laws, for the purpose of supervising, and to some extent controlling, the acts of the railroads operating within the State. Such a commission is subject to a suit by a citizen. *Reagan* v. *Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537. We do not see that *Arbuckle* v. *Blackburn*, 191 U. S. 405, is at all in point."

It is believed that this Court, at least by way of dictum, had stated the principle adhered to by the Court of Appeals for the Fifth Circuit in *Illinois Cent. R. Co.* v. *Mississippi Railroad Commission*, 138 F. 327, *supra*. Such statement appears to have been given in *Prout* v. *Starr*, 188 U. S. 537, in which this Court held that in an action properly instituted against a state official the Eleventh Amendment is not a barrier to a judicial inquiry as to whether the provisions of the Fourteenth Amendment have been disregarded by state enactments. This Court, at page 543, said:

"The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, * * *."

The answer to the above-posed italicized question as to the supremacy of the Federal Government seems clear, in view of the consequences that would follow if the authority granted the Federal Government by Article 1, Section 8, were held to be subordinate to the interdiction of the Eleventh Amendment. Numerous small railroads en-

gaged in interstate commerce are owned by states, or their municipalities.* Following is a list of the names of these railroads:

Savannah State Docks,
Lewiston & Auburn Ry. Co.,
Norway Branch R. R. Co.,
Belfast & Moosehead Lake R. R. Co.,
Plattsburgh & Dannemora R. R.,
North Brookfield R. R. Co.,
Mount Gilead Short Line Ry.,
Holyoke & Westfield R. R. Co.,
The Atlantic & North Carolina R. R. Co.,
Western & Atlantic R. R.,
Lakeland Railway,
The North Carolina R. R. Co.,
Cincinnati Southern Railway,
Albany Port District Railroad,
Board of Harbor Commissioners R. R.,
Jay Street Connecting R. R.,
The Philadelphia Belt Line R. R. Co.,
Broward County Port Authority,
Municipal Docks Railway,
New Orleans Public Belt R. R.,
Port Utilities Commission of Charleston, South Carolina,
Terminal Ry. Alabama State Docks,
Galveston Wharves, Board of Trustees of
Harbor Belt Line R. R.,
Municipal Terminal R. R.,
State Belt R. R. of California,
Stockton Port District,
California & Oregon Coast R. R.,
City of Prineville Railway,
Texas State Railroad.

Particular attention is directed to the Cincinnati Southern Railway, which owns a railroad line from Cincinnati,

* I. C. C. Sixty-ninth Annual Report on the Statistics of Railways in the United States for the Year ended December 31, 1955 * * * Prepared by the Bureau of Transport Economics and Statistics.

Ohio, extending south to Memphis, Tennessee, and which presently constitutes part of the great Southern Railway system. The elimination of this group of interstate carriers from the Congressional plan for regulating labor-management relations throughout the general system of interstate railroad transportation would not be in the interest of the public, the railroads, or their employees.

V.

Answer to Amicus Curiae Brief of California State Employees' Association in Support of Petitioner's Position.

The principal theme of the Brief *amicus curiae* filed by the California State Employees' Association in this case is that certain employees of the State Belt Railroad are members of the Association and it is adverse to the interests of these employees to be compelled to work subject to the rates of pay, rules and working conditions established by the collective agreement, dated September 1, 1942, negotiated by the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen with the Board of State Harbor Commissioners. The contention is made that the rights and benefits which the employees of the State Belt Railroad enjoy under this collective agreement are less favorable than would be their rights and benefits if the rates of pay, rules and working conditions were fully subject to the California state law and administrative regulations.

The merit of this lament on behalf of those persons employed by the State Belt Railroad who happen to be members of the California State Employees' Association can be fairly measured by the fact that the two Brotherhoods were freely chosen by the operating employees of the State Belt Railroad to be the craft representatives of these employees; that the continuance of these Brother-

hoods in the job of craft representative depends upon the will of the majority of the members of the crafts concerned; that the service rendered by the Brotherhoods as craft representatives may be terminated at any time; and that the services of the Association may be selected in lieu of the Brotherhoods whenever the majority of the employees are dissatisfied with the rates of pay and working conditions obtained for them through the efforts of these Brotherhoods. It is, we suggest, reasonable to suppose that if a majority of the operating employees of the State Belt Railroad preferred the rates of pay, rules governing seniority, and other aspects of the employment relationship which would become effective if the California law and administrative regulations were fully applied to their employment, the will of the majority would and could readily be made known to their agents. The craft representative chosen by a majority could readily substitute such rates of pay and employment rights, through negotiation with the Board of State Harbor Commissioners, in lieu of those prescribed by the collective agreement.

The fact that the majority of the operating employees of the State Belt Railroad chose the two Brotherhoods as their representatives, to negotiate a collective bargaining agreement on their behalf under the Railway Labor Act in preference to selecting the California State Employees' Association to accept the State Civil Service System, well illustrates the wisdom of the Congress in enacting the Railway Labor Act as the primary instrument of government for the making and maintenance of agreements concerning rates of pay, rules and working conditions and as the best means to avoid any interruption to interstate commerce growing out of any dispute between a carrier and its employees.

CONCLUSION.

These respondents respectfully suggest that this Court should hold that the ownership by a state of a railroad engaged in interstate commerce does not exempt the operation of such carrier from the requirement of complying with the Railway Labor Act; that the Federal policy, embodied in that Act, of requiring that rates of pay, rules and working conditions for railroad employees be established by means of collective bargaining between management and representatives of employees, precludes the state which owns the carrier from dictating by legislation or administrative action the rates of pay and conditions of employment of such employees; and that the authority vested in the Federal government by Article 1, Section 8, Clause 3, to regulate interstate commerce is complete and is not subject to the limiting condition imposed by the Eleventh Amendment.

Respectfully submitted,

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